No. 17-130

# In the Supreme Court of the United States

RAYMOND J. LUCIA, ET AL., PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR RESPONDENT SUPPORTING PETITIONERS


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## QUESTION PRESENTED

Whether administrative law judges of the Securities and Exchange Commission are Officers of the United States within the meaning of the Appointments Clause.

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## BRIEF FOR RESPONDENT SUPPORTING PETITIONERS

### OPINIONS BELOW

The order of the en banc court of appeals denying the petition for review by an equally divided court (Pet. App. 1a-2a) is reported at 868 F.3d 1021. An opinion of the court of appeals (Pet. App. 3a-36a) is reported at 832 F.3d 277. The opinion and order of the Securities and Exchange Commission (Pet. App. 37a-109a) are reported at 112 SEC Docket 1754, and are available at 2015 WL 5172953.

### JURISDICTION

The judgment of the court of appeals was entered on August 9, 2016. The court granted rehearing and entered a new judgment denying the petition for review on June 26, 2017 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 21, 2017. The petition was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-21a.

## STATEMENT

1. Congress has created a comprehensive scheme for the commencement, adjudication, and judicial review of proceedings brought by the Securities and Exchange Commission (SEC or Commission) to enforce the Nation's securities laws. The Commission is authorized under the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, to address statutory violations by instituting administrative proceedings before the agency. See, *e.g.*, 15 U.S.C. 77h-1, 78u-3, 80a-9(b), 80a-41(a), 80b-3(e), (f), and (k); 15 U.S.C. 78d, 78*o* (2012 & Supp. IV 2016).

In an administrative enforcement proceeding, the Commission itself may preside and issue a final decision. 17 C.F.R. 201.110. In the alternative, Congress has authorized the Commission to delegate "its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board." 15 U.S.C. 78d-1(a); see 5 U.S.C. 556(b) (in certain agency hearings, "the agency," "members of the body which comprises the agency," or "administrative law judges" may preside). Exercising that authority, the Commission has provided by rule that it may delegate the initial stages of conducting an enforcement proceeding to a "hearing officer." 17 C.F.R. 201.110. The hearing officer may be

an administrative law judge (ALJ), a single Commissioner, multiple Commissioners (short of a quorum of the Commission), or "any other person duly authorized to preside at a hearing." 17 C.F.R. 201.101(a)(5).

The Commission historically has chosen to assign ALJs to act as hearing officers in its proceedings. Under 5 U.S.C. 3105, "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title," which are provisions governing agency hearings where a rulemaking or adjudication is required by statute to be determined on the record after an opportunity for a hearing. See 5 U.S.C. 553(c), 554(a), 556, 557. The Commission currently employs five ALJs,[1] who were selected by its Chief ALJ, subject to approval by the Commission's Office of Human Resources on the exercise of authority delegated by the Commission. Pet. App. 295a-297a.[2]

In the capacity of a hearing officer in an SEC enforcement proceeding, an ALJ "shall have the authority to do all things necessary and appropriate to discharge his or her duties." 17 C.F.R. 201.111. Among other responsibilities, the ALJ may administer oaths; issue, revoke, quash, or modify subpoenas; receive and rule on

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[1] See U.S. Office of Pers. Mgmt., *ALJs by Agency* (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

[2] The day after filing its response to the petition for certiorari in this case, the Commission ratified the appointment of its ALJs. See U.S. SEC, *Order* (Nov. 30, 2017), https://www.sec.gov/litigation/opinions/2017/33-10440.pdf. The Commission did not take any action, however, that would disturb cases, such as this one, that were already under judicial review at the time. See 15 U.S.C. 78y(a)(3) (court of appeals' jurisdiction over a case arising from the Commission becomes "exclusive on the filing of the record").

the admission of evidence; withhold a party's access to agency documents; and "rul[e] upon all procedural and other motions." 17 C.F.R. 201.111(h); see 17 C.F.R. 201.111(a), (b), and (c), 201.230(a)(1). In response to "[c]ontemptuous conduct" during a proceeding, the ALJ may exclude the contemnor from the hearing or may "[s]ummarily suspend that person from representing others in the proceeding." 17 C.F.R. 201.180(a)(1)(ii). If the ALJ concludes that a filed document "fails to comply" with the Commission's rules or with the ALJ's own orders, the ALJ may "reject" the filing, which "shall not be part of the record." 17 C.F.R. 201.180(b). The ALJ also may, under certain circumstances, deem a party to be "in default" and thus may "determine the proceeding against that party upon consideration of the record * * * , the allegations of which may be deemed to be true." 17 C.F.R. 201.155(a).

Following an administrative hearing, the ALJ must issue an "initial decision" within a specified number of days. 17 C.F.R. 201.360(a)(2). The ALJ's initial decision may be reviewed by the Commission *sua sponte* or at the request of a party or other aggrieved person. 17 C.F.R. 201.410, 201.411(c). If further review is not requested, or if the Commission declines to undertake such review, the ALJ's initial decision "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. 78d-1(c); see 17 C.F.R. 201.360(d)(2). When review by the Commission does occur, the Commission may "make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. 201.411(a). The Commission also may remand the case to the ALJ to take additional evidence or may itself take additional

evidence. 17 C.F.R. 201.452. The Commission will either issue its own opinion or will issue an "order of finality" stating that the ALJ's initial decision has become final and effective. 17 C.F.R. 201.360(d)(2); see Pet. App. 90a.

A party who is aggrieved by a final order of the Commission may seek judicial review of that order by filing a petition for review directly in a federal court of appeals. See 15 U.S.C. 77i(a), 78y(a)(1), 80a-42(a), 80b-13(a).

2. Once appointed, the Commission's ALJs (like all ALJs) may be removed from their positions "only for good cause established and determined by the Merit Systems Protection Board [MSPB or Board] on the record after opportunity for hearing before the Board." 5 U.S.C. 7521(a); see 5 U.S.C. 7521(b)(1). Congress has not defined what constitutes "good cause" sufficient under Section 7521 to provide a basis for removing an ALJ. See pp. 48-49, *infra*. The Board is composed of three members who are appointed by the President with the Senate's consent, 5 U.S.C. 1201, and are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. 1202(d).

Under regulations adopted by the Board, the employing agency, upon determining that an ALJ should be removed, submits a complaint to the Board detailing the relevant charges of misconduct or other cause for discipline. See 5 C.F.R. 1201.137(b). The Board has delegated authority to issue initial decisions in ALJ-removal proceedings to its own ALJs, see 5 C.F.R. 1201.140(a), or to an ALJ detailed to the Board from another agency, see 5 U.S.C. 3344; 5 C.F.R. 930.208. On exercise of such authority, the Board's ALJ conducts a hearing on the record to determine whether the agency has shown good cause for the penalty selected. Upon

finding by a preponderance of the evidence that the employing agency has shown good cause for removal, the Board's ALJ will issue an initial decision authorizing the employing agency to remove the ALJ. See 5 C.F.R. 1201.140(b) (describing procedure for good cause determination); 5 C.F.R. 1201.56(b)(1)(i) (identifying burden and degree of proof). That initial decision is subject, upon a petition for review, to plenary review by the Board. See 5 C.F.R. 1201.140(a)(2).

Issuance of the Board's final decision, if adverse to the ALJ, marks the effective date of the ALJ's removal (or other disciplinary action). Final decisions of the Board are subject to judicial review in the Federal Circuit at the behest of an aggrieved ALJ. See 5 U.S.C. 7703; 5 C.F.R. 1201.141. The employing agency has no appeal as of right from an adverse Board decision. But the Director of the Office of Personnel Management may petition for review in the Federal Circuit. 5 U.S.C. 7703(d)(1). Whether to accept such a petition from the Director "shall be at the discretion of the Court of Appeals." *Ibid.*

3. Petitioners were registered investment advisers who marketed a wealth-management strategy that they called "Buckets of Money," under which retirement savings were divided among assets of different risk levels (*e.g.*, bonds, fixed annuities, and stocks) and periodically reallocated as those assets changed in value. Pet. App. 38a, 41a, 127a. The Commission instituted administrative proceedings against petitioners based on allegations that petitioners had used misleading slideshow presentations to deceive prospective clients. *Id.* at 41a-51a. The Commission charged petitioners with violating the Securities Exchange Act, the Investment Advisers Act, and the Investment Company Act. *Id.* at 238a.

a. The Commission assigned the initial stages of the proceeding to an ALJ, who conducted a hearing that lasted nine days. Pet. App. 116a. The ALJ presided over witness testimony and cross-examinations, admitted documentary evidence, and ruled on objections. Pet. 5. In so doing, the ALJ established "the official record" of the administrative proceeding. Pet. App. 117a n.2.

After the hearing, the ALJ issued an initial decision finding that petitioners had made fraudulent misrepresentations related to one of their investment strategies; the ALJ did not, however, make factual findings regarding the remaining claims. Pet. App. 117a. The Commission then remanded to the ALJ for fact-finding on the three remaining claims, noting the "vital role that initial decisions play in the Commission's decisional process." *Id.* at 241a. The Commission explained that a determination by the ALJ as to the remaining claims would be of "considerable importance" because the Commission itself had not "observed the parties and witnesses." *Ibid.*

On remand, the ALJ issued a revised initial decision finding that petitioners had willfully and materially misled investors, in violation of the Investment Advisers Act. Pet. App. 195a-225a. The decision ordered a variety of sanctions to be imposed on petitioners, including revocation of their registrations as investment advisers; a permanent bar on associating with investment advisers, brokers, or dealers; a cease-and-desist injunction against future violations; and a total of $300,000 in civil monetary penalties. *Id.* at 235a; see *id.* at 225a-233a.

b. On appeal, the Commission conducted "an independent review of the record, except with respect to those findings not challenged on appeal." Pet. App. 40a.

The Commission determined that the ALJ had correctly found that petitioners, in marketing their Buckets of Money strategy, willfully made fraudulent statements and omissions in violation of the Investment Advisers Act. *Id.* at 66a-86a. The Commission also largely "affirm[ed]," with limited exceptions, "the sanctions imposed below" by the ALJ. *Id.* at 95a; see *id.* at 95a-107a. Commissioners Gallagher and Piwowar dissented with respect to one aspect of the Commission's liability determination. *Id.* at 110a-114a.

Petitioners argued before the Commission that the proceedings against them were unlawful because the ALJ who had conducted the hearing and issued the initial decision was an "Officer[] of the United States" within the meaning of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. See Pet. App. 86a. Petitioners noted that the ALJ had not been appointed, in accordance with that provision, "by the President, the head of a department, or a court of law." *Id.* at 87a. The Commission rejected petitioners' argument. In the Commission's view, its ALJs were mere employees rather than constitutional officers because they do not exercise "significant authority independent of the [Commission's] supervision." *Id.* at 88a; cf. *Buckley* v. *Valeo*, 424 U.S. 1, 126 n.162 (1976) (per curiam) (employees are "lesser functionaries subordinate to officers").

Among other things, the Commission explained, its ALJs "issue 'initial decisions' that are * * * not final," Pet. App. 88a-89a; a person aggrieved by an initial decision may seek review before the Commission, which "grant[s] virtually all petitions for review," *id.* at 89a (citation omitted); the Commission may review any ALJ decision *sua sponte*, *ibid.*; review of an ALJ's decision is *de novo*, *id.* at 90a-91a; and under the Commission's

rules, "no initial decision becomes final simply on the lapse of time by operation of law," but instead becomes final only upon "the Commission's issuance of a finality order," *id.* at 90a (citation and internal quotation marks omitted). The Commission also distinguished this Court's decision in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), in which special trial judges of the Tax Court were determined to be inferior officers under the Appointments Clause. Pet. App. 92a-93a.

4. On appeal of the Commission's order, a panel of the court of appeals denied the petition for review. Pet. App. 3a-36a. The court first rejected petitioners' Appointments Clause challenge, holding that the Commission's ALJs are mere employees rather than officers under the Clause because they do not exercise "significant authority pursuant to the laws of the United States." *Id.* at 11a (quoting *Buckley*, 424 U.S. at 126). For that conclusion, the court rested on its previous decision in *Landry* v. *FDIC*, 204 F.3d 1125, 1133-1134 (D.C. Cir.), cert. denied, 531 U.S. 924 (2000), which held that ALJs of the Federal Deposit Insurance Corporation did not exercise significant authority because they could not issue final decisions on behalf of the agency. See Pet. App. 12a. The court deemed it similarly dispositive here, in determining the constitutional status of the Commission's ALJs, that their initial decisions are non-final. *Id.* at 13a-19a.

The court of appeals further rejected petitioners' attempt to equate the Commission's ALJs with the special trial judges of the Tax Court who were held to be officers in *Freytag*. The special trial judges were distinguishable in the court of appeals' view because, as "members of an Article I court," they "could exercise the judicial power of the United States" and could "issue

final decisions in at least some cases." Pet. App. 11a-12a. The court of appeals also found special trial judges to be different than the Commission's ALJs because "the Tax Court in *Freytag* was required to defer to the special trial judge's factual and credibility findings unless they were clearly erroneous." *Id.* at 19a (citation and internal quotation marks omitted). The Commission, by contrast, "is not required to adopt the credibility determinations of an ALJ." *Ibid.*

On the merits, the court of appeals determined that substantial evidence supported the Commission's liability findings, Pet. App. 21a-32a, and that the Commission had not abused its discretion in ordering sanctions against petitioners, *id.* at 33a-36a.

5. Petitioners sought rehearing en banc, which the court of appeals granted on February 16, 2017. Pet. App. 244a-246a. On June 26, 2017, the en banc court issued a per curiam judgment denying the petition for review "by an equally divided court." *Id.* at 1a-2a.

## SUMMARY OF ARGUMENT

Under Article II, only a properly appointed officer, whose exercise of executive power is subject to appropriate presidential supervision, may exercise significant governmental authority of the type entrusted by law to the ALJ in this case.

I. The Appointments Clause provides the exclusive method for appointment of "Officers of the United States," a term that includes public officials who "exercis[e] significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam). The Commission's ALJs perform important functions in service of the execution of the Nation's securities laws: They preside over hearings, rule on motions, and create the administrative record. At

the conclusion of those hearings, ALJs issue initial decisions that interpret and apply the law; if not further reviewed, their decisions are "deemed the action of the Commission." 15 U.S.C. 78d-1(c). They accordingly exercise significant governmental authority, of a type substantially similar to the authority exercised by the special trial judges of the Tax Court found to be inferior officers in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991). The Commission's ALJs are thus "inferior Officers" within the meaning of the Clause.

The nature of the authority exercised by the Commission's ALJs confirms that they are constitutional officers, rather than mere employees. Congress, in enacting the Administrative Procedure Act, deliberately chose to model the relationship between an agency and its "hearing examiners" (precursors to modern ALJs) on the relationship between appellate and trial courts. This Court's cases have similarly recognized the close parallel, in terms of functions and powers, between ALJs who preside over adversarial hearings and district judges. The Commission's ALJs also administer securities laws that permit the imposition of civil monetary penalties on registered or unregistered persons, powers that traditionally have been available only in district-court proceedings.

The panel below based its contrary conclusion almost entirely on the inability of ALJs to render final decisions. Giving that factor dispositive weight, however, is inconsistent with this Court's decision in *Freytag*, where the special trial judges were found to be inferior officers even though many of their decisions were subject to further review. The panel's single-minded focus on finality is also inconsistent with *Edmond* v. *United States*, 520 U.S. 651 (1997), which treated final decision-

making authority as a factor bearing on the dividing line between principal and inferior officers, not the line between inferior officers and employees. Finally, the Commission routinely affords substantial deference to ALJ credibility determinations, further confirming the significance of the role ALJs perform.

As inferior officers, the Commission's ALJs should have been appointed, in conformance with the Appointments Clause, by the Commission (as the Head of Department). But the ALJ who presided over petitioners' case was selected by the Commission's Chief ALJ, not the Commission itself, and his appointment was therefore invalid.

II. Because the Commission's ALJs possess significant authority, of the type that can only be exercised by a constitutional officer, a question arises regarding the statutory constraints that exist on removing them from office. The Court should address the removal issue now, to prevent a prolonged period of uncertainty regarding the authority of ALJs—whether or not properly appointed—to continue serving in agencies throughout the government.

This Court has permitted some tenure protections for inferior officers. But it has invalidated, as inconsistent with the President's responsibility to faithfully execute the laws, statutory restrictions that prevent adequate supervision of those who wield significant authority within the Executive Branch.

Under 5 U.S.C. 7521(a), an ALJ may be removed by an agency head "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." Under the constitutional avoidance canon, this Court should construe Section 7521 to permit agency heads to

remove ALJs in a manner that ensures a constitutionally adequate level of Executive Branch supervision. In particular, the "good cause" for removing an ALJ is properly read to include an ALJ's misconduct or failure to follow lawful directives or to perform adequately. That interpretation would not permit removal of an ALJ for a legally prohibited reason, or to direct the result in a particular case. But it would ensure that ALJs could be held sufficiently accountable, even in independent agencies, for failure to execute the laws properly. For similar reasons, the Court should hold that cause "established and determined by the Merit Systems Protection Board" means that, rather than substitute its own judgment for that of the agency, the MSPB should confine its role to determining whether evidence exists to support the agency's view that "good cause" as defined above exists.

Thus interpreted, Section 7521 would leave the President with constitutionally adequate authority to ensure that ALJs are faithfully executing the law. If the Court determines that this interpretation cannot be reconciled with the statute, however, it should invalidate and sever the portion that cannot be interpreted to avoid unconstitutional interference with the President's supervision of the Executive Branch. Any further constitutional concerns, regarding Section 7521's requirement that removal may occur only "after opportunity for hearing before the Board," can be addressed in appropriate cases between employing agencies and their ALJs, because the timing of removal rather than suspension with pay does not affect the rights of private parties appearing before ALJs.

## ARGUMENT

The Appointments Clause safeguards the President's ability to faithfully execute the laws by making governmental officials who wield significant executive authority accountable to the President. The Commission's ALJs, who preside over complex adversarial disputes and issue initial decisions that often become the final decisions of the agency, wield significant authority on behalf of the United States. They are thus "inferior Officers" who must be appointed in conformance with the Appointments Clause. Statutory restrictions on removing the Commission's ALJs likewise must be construed, under separation-of-powers principles, to afford appropriate presidential supervision.

The government took the position before the court of appeals that the Commission's ALJs are mere employees, rather than constitutional officers. Upon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that such ALJs are officers because they exercise "significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam). The government has reassessed the importance of the functions that ALJs perform, as well as the proper interpretation of this Court's decision in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), which held that adjudicative officials exercising similar functions were inferior officers for purposes of the Appointments Clause.

### I. THE COMMISSION'S ALJs ARE CONSTITUTIONAL OFFICERS SUBJECT TO THE APPOINTMENTS CLAUSE

The Constitution vests "[t]he executive Power" of the United States in the President, U.S. Const. Art. II, § 1, Cl. 1, who is charged with responsibility to "take

Care that the Laws be faithfully executed," *id.* § 3. The Framers, however, recognized that, "in a republican government," the President would need to rely on the assistance of subordinate officials "to give dignity, strength, purity, and energy to the administration of the laws." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1524, at 376 (1833). To govern effectively, the President must be able to depend upon others to carry out his responsibility for faithful execution of the laws and thus to exercise a portion of the sovereign authority of the United States, including the power to "bind third parties, or the government itself, for the public benefit." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 87 (2007) (2007 OLC Mem.). The Constitution accordingly provides for the creation of public offices "established by Law" and for the appointment of "Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2.

**A. The Appointments Clause Prescribes The Manner For Selecting Officials Who Exercise "Significant Authority Pursuant To The Laws Of The United States"**

1. "The 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag*, 501 U.S. at 883 (quoting Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 79 (1969)). The Framers therefore chose to "limit[] the appointment power," so as to "ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 884. Far from being a mere matter of "etiquette or protocol," *Buckley*, 424 U.S. at 125, limitations on the method of appointing public officials are "among the significant structural safeguards

of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997); see *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010) ("Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.") (citation and internal quotation marks omitted).

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, provides the only method by which "Officers of the United States" may be appointed. For "principal Officer[s]," they must be appointed by the President, by and with the advice and consent of the Senate. *Id.* Cls. 1, 2. The same manner of appointment applies to "inferior Officers"—*i.e.*, those "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *Edmond*, 520 U.S. at 663—except where their appointments have instead been vested by law "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. These appointment methods, for principal and inferior officers, are exhaustive: "[A]ll persons who can be said to hold an office under the government * * * were intended to be included within one or the other of these modes of appointment." *United States* v. *Germaine*, 99 U.S. 508, 510 (1879).

The constraints of the Appointments Clause, however, do not apply to the entire federal workforce. One may be "an agent or employé working for the government and paid by it * * * without thereby becoming its officer[ ]." *Germaine*, 99 U.S. at 509. Much of the work of the Executive Branch is performed by non-officer "employees"—that is, by "lesser functionaries" whose

work is overseen by officers and who need not themselves be appointed pursuant to the Appointments Clause. *Buckley*, 424 U.S. at 126 n.162. This Court recently estimated that the percentage of federal employees and agents who are *not* officers "dramatically" exceeds 90%. *Free Enter. Fund*, 561 U.S. at 506 n.9; see *Germaine*, 99 U.S. at 509 ("nine-tenths of the persons rendering service to the government undoubtedly are" not officers).

2. Although distinguishing between constitutional officers and mere employees is not always straightforward, this Court has provided guidance. In *Buckley*, the Court explained that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. 424 U.S. at 126 (citation omitted). That description—and its focus on "significant" governmental authority—reflects the common understanding at the time of the Founding that "[a] public office is the right, authority and duty, created and conferred by law, by which for a given period * * * an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1-2 (1890) (summarizing English and early American sources); see 2007 OLC Mem. 84-87.[3]

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[3] Not all officials who wield significant authority require appointment in conformity with the Appointments Clause. To qualify as a constitutional officer, one also must occupy a continuing office established by law. See 2007 OLC Mem. 100; see also *Freytag*,

The nature of significant authority was addressed in *Freytag*. There, the Court considered whether special trial judges of the Tax Court were inferior officers rather than employees. The special trial judges were appointed by the Chief Judge and were authorized to hear certain proceedings specified by law, see 26 U.S.C. 7443A(b) (1988), as well as other proceedings designated by the Chief Judge. See 501 U.S. at 870-871. In the specified proceedings, the special trial judges were authorized to issue final decisions. 26 U.S.C. 7443A(c) (1988). But in other designated proceedings, they could only "prepare proposed findings and an opinion" for a Tax Court judge, who would render the "actual decision." 501 U.S. at 873.

The petitioners in *Freytag* were taxpayers who had objected to tax deficiencies assessed against them and sought review in the Tax Court. 501 U.S. at 870-871. The Chief Judge designated the case to be heard by a special trial judge, who was assigned to "preside over the trial as evidentiary referee" and "for preparation of written findings and an opinion." *Id.* at 871. Ultimate "disposition" of the case, however, was reserved for the Chief Judge, who "had the duty to review the work of the Special Trial Judge." *Id.* at 872 n.2. Following an adverse decision by the special trial judge and an unsuccessful appeal to the Chief Judge, the petitioners "contended that the assignment of cases as complex as

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501 U.S. at 881 (Appointments Clause does not apply to special masters hired on a "temporary, episodic" basis); *Germaine*, 99 U.S. at 511-512 (noting relevance of office's "tenure" and "duration," including whether official's duties are "continuing and permanent, not occasional or temporary"). There is no dispute in this case that the Commission's ALJs occupy continuing positions established by law. See pp. 3-6, *supra*.

theirs to a special trial judge" in the first instance "violated the Appointments Clause of the Constitution." *Id.* at 872.

In addressing that claim, this Court rejected the government's argument that "special trial judges may be deemed employees," rather than constitutional officers, "because they lack authority to enter a final decision." *Freytag*, 501 U.S. at 881. That argument, the Court explained, "ignores the significance of the duties and discretion that special trial judges possess." *Ibid.* Unlike special masters, who are hired "on a temporary, episodic basis" to perform ad hoc tasks, the Court reasoned, special trial judges occupy an office "'established by Law,'" and the "duties, salary, and means of appointment for that office are specified by statute." *Ibid.* (quoting U.S. Const. Art. II, § 2, Cl. 2). Moreover, the Court emphasized, special trial judges, in presiding over preliminary proceedings, "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* at 881-882. "In the course of carrying out these important functions," the Court concluded, "special trial judges exercise significant discretion." *Id.* at 882.

The Court went on to hold in the alternative that special trial judges would qualify as constitutional officers "[e]ven if" their ability to issue initial decisions in cases like the petitioners' were not so "significant." *Freytag*, 501 U.S. at 882; see *ibid.* ("[O]ur conclusion would be unchanged."). That is because, the Court explained, special trial judges were also authorized by law to "render the decisions of the Tax Court [*i.e.*, final decisions] in declaratory judgment proceedings and limited-amount tax cases." *Ibid.* Since it was not disputed that "a special trial judge is an inferior officer for purposes

of" those proceedings, the Court concluded that their appointments must comply with the Appointments Clause for all purposes. *Ibid.* ("Special trial judges are not inferior officers for purposes of some of their duties * * * but mere employees with respect to other responsibilities.").

**B. The Commission's ALJs Exercise "Significant Authority"**

The Commission's ALJs "closely resemble" the special trial judges at issue in *Freytag*. *Bandimere* v. *SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016), petition for cert. pending, No. 17-475 (filed Sept. 29, 2017). Like the special trial judges, ALJs occupy a position fixed by law. See 5 U.S.C. 3105 (appointment authority), 5372(b) (compensation). They preside over trial-like hearings in which they control the conduct of the parties for the adjudication of charges seeking sanctions for violations of provisions regulating their primary conduct. They rule on motions and shape the record; and at the hearings' conclusion, ALJs issue rulings that interpret and apply the law to the facts as found, often rendering decisions that are deemed to be on behalf of the Commission itself. These ALJs accordingly "exercis[e] significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126, as several Members of the Court previously have recognized. See *Free Enter. Fund*, 561 U.S. at 542 (Breyer, J., dissenting, joined by Stevens, Ginsburg, and Sotomayor, J.J.); *Freytag*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in the judgment, joined by O'Connor, Kennedy, and Souter, J.J.).

*1. An ALJ who adjudicates a dispute on behalf of the Commission performs important executive functions*

The Commission's ALJs preside over adversarial proceedings through a grant of significant authority "delegate[d]" from the Commission. 15 U.S.C. 78d-1(a). The Commission's ALJs are authorized, among other things, to administer oaths, hold hearings, take testimony and admit evidence, issue or quash subpoenas, rule on motions, impose sanctions on contemptuous hearing participants, reject deficient filings, and enter default judgments. See 17 C.F.R. 201.111(a), (b), (c), and (h), 201.180(a)-(c). Thus, like the special trial judges in *Freytag*, the Commission's ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, [they] exercise significant discretion." 501 U.S. at 881-882.[4] At the conclusion of a hearing, the ALJ issues an "initial decision" that "include[s] findings and conclusions * * * as to all the material issues of fact, law or discretion presented on the record

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[4] Although the Tax Court in *Freytag* was authorized to "punish contempts by fine or imprisonment," 501 U.S. at 891 (citing 26 U.S.C. 7456(c)), the Commission and its ALJs have the authority to punish "[c]ontemptuous conduct" only by "[e]xclud[ing]" the contemnor from the deposition or hearing or by "[s]ummarily suspend[ing] that person from representing others in the proceeding." 17 C.F.R. 201.180(a)(1). This Court's "officer" holding in *Freytag*, however, relied on the special trial judges' "power to enforce compliance with discovery orders," not on the particular type of contempt sanction available. 501 U.S. at 882. This Court invoked the specific power to fine or imprison only in support of its subsequent holding that the Tax Court was a "'Court of Law' within the meaning of the Appointments Clause." *Id.* at 890 (brackets omitted); see *id.* at 890-891.

and the appropriate order, sanction, relief, or denial thereof." 17 C.F.R. 201.360(b).

In some instances, moreover, an initial ALJ decision becomes the final decision for the Commission itself. Under the Commission's organic statute, if further review of the ALJ's decision is not sought, or if a request for such review is denied by the Commission, the ALJ's initial decision "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. 78d-1(c). To be sure, the Commission has, by regulation, adopted a policy that in cases in which plenary review by the Commission does not occur, the Commission "will issue an order" of its own confirming that the ALJ's decision has become final. 17 C.F.R. 201.360(d)(2). But the ALJ's initial decision is still "deemed" by statute to be "the action of the Commission"; the finality order, by definition, issues only when the Commission has *not* engaged in plenary review of the ALJ's decision. The vast majority of ALJ decisions (approximately 90%), which often involve default findings or other uncontested decisions, are not reviewed on the merits by the Commission, and thus the initial decision authored by the ALJ functions as the final decision of the Commission. See *Bandimere*, 844 F.3d at 1184 n.36, 1187 n.41.[5]

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[5] Notwithstanding the Commission's finality-order regulation, for many years its ALJs issued self-executing default orders in cases in which the respondent failed to appear. See *In re Alchemy Ventures, Inc.*, Exchange Act Release No. 70,708, 2013 WL 6173809 (Oct. 17, 2013) (describing and disapproving of this practice). In those cases, the ALJ's default order became the final and enforceable decision of the agency without *any* additional action by the Commission, a practice that the Commission has disavowed.

The significance of the ALJs' decision-making authority is further underscored by the fact that, in most cases, adversely affected parties do not have any statutory or regulatory entitlement to review by the Commission. Agency regulations make Commission review mandatory when sought in a few specified types of cases, 17 C.F.R. 201.411(b)(1), but in most instances, Commission review is "[d]iscretionary" and the "Commission may decline to [grant] review," 17 C.F.R. 201.411(b)(2) (emphasis omitted). Earlier in this litigation, the government emphasized that the Commission has voluntarily assumed the practice of granting merits review in all cases where it is timely sought. See Pet. App. 89a. But the Commission's practice—which is not mandated by any statute or regulation—does not alter the fact that the Commission's ALJs are authorized to issue decisions that can become final decisions of the agency even where a sanctioned party wishes to challenge the ALJ's determination on the merits before the Commission.

The fact that the Commission may choose to grant plenary review of the ALJ's initial decision, as it did in this case, does not undermine the conclusion that the Commission's ALJs possess significant authority of the type required to be exercised by a constitutional officer. *Freytag* recognized that it is not possible for public officials to be "inferior officers for purposes of some of their duties * * * but mere employees with respect to other responsibilities." 501 U.S. at 882. The "significant" authority exercised by the Commission's ALJs in cases where their decisions are not further reviewed makes them constitutional officers even if, in other cases, they wield a lesser form of authority. *Ibid.*

In any event, ALJs exercise significant authority even when the Commission grants plenary review of their initial decisions. As explained above, rather than acting as mere "aid[es]" to the ultimate decision-maker, the Commission's ALJs "exercise significant discretion" in the course of carrying out "important functions" that closely resemble those performed by the special trial judges in *Freytag*. 501 U.S. at 880, 882; see *id.* at 881-882. Indeed, the Commission in this case recognized the "vital role that initial decisions play in the Commission's decisional process." Pet. App. 241a. It explained that the Commission affords an ALJ's determination "considerable importance," because the Commission itself has not "observed the parties and witnesses" and the ALJ "is in the best position to make findings of fact, including credibility determinations, and resolve any conflicts in the evidence." *Ibid.*; see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951) (recognizing that ALJ "decisions [are] of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing") (citation and internal quotation marks omitted).

Finally, the government notes that it does not rely, as petitioners have, on nineteenth-century decisions of this Court concluding that an array of comparatively unimportant positions are "offices." See, *e.g.*, Pet. 11-12. These early decisions were primarily concerned with the question whether Congress *intended* to treat a position it had created by statute as an "office," not whether the functions of the position were so significant that the Constitution *required* that the position be held by an officer appointed pursuant to the Appointments

Clause.[6] The Court therefore looked at whether the appointment had occurred in the manner contemplated by the Clause as evidence of whether Congress intended to treat the appointee as an officer. These decisions, however, do not themselves speak to whether the Commission's ALJs exercise significant authority of the type that can only be possessed by a properly appointed constitutional officer. Instead, that inquiry turns on whether ALJs exercise significant governmental authority, which they do for the reasons stated above.

***2. In presiding over proceedings of the Commission, an ALJ serves a role comparable to that of a trial judge***

When Congress in 1946 enacted the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (5 U.S.C. 551 *et seq.*), it used trial courts as a model for the position that became the modern ALJ—a parallel that has only strengthened over time, as ALJs have been given powers that previously could only have been exercised by district courts. Those similarities further confirm that the Commission's ALJs exercise significant authority for purposes of the Appointments Clause.

a. The strong parallel between ALJs and Article III judges exists by congressional design. Prior to the APA, administrative agencies relied on hearing "examiners" who, along with other employees, performed various tasks to assist in assembling the administrative record. See Act of June 29, 1906, ch. 3591, 34 Stat. 595

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[6] See, *e.g.*, *Germaine*, 99 U.S. at 509 (civil surgeon could not be prosecuted under criminal statute applicable only to an "officer of the United States who is guilty of extortion") (citation omitted); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 391-392 (1868) (statute forbidding embezzlement by "officers" applied to clerk appointed by the assistant treasurer in Boston with the approbation of the Acting Secretary of the Treasury).

(authorizing the Interstate Commerce Commission "to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence"); see also, *e.g.*, Act of Sept. 26, 1914, ch. 311, 38 Stat. 718 (Federal Trade Commission); Act of Sept. 7, 1916, ch. 451, 39 Stat. 729 (United States Shipping Board). Their powers were limited. For example, the Commission's hearing examiners were permitted to "rule on contested motions for postponement, continuance and the time and place of hearings," but "[a]ll other motions [could] be ruled on only by the Commission." S. Doc. No. 8, 77th Cong., 1st Sess. 395-396 (1941) (*Attorney General's Report*). Although the Commission's rules of practice authorized hearing examiners to file reports containing findings of fact, they generally did "not permit inclusion of conclusions of law or recommendations in the report," though this restriction was not followed in all cases. *Id.* at 396. The Commission itself reexamined all hearing-examiner reports *de novo*, regardless whether exceptions had been filed, and the Commission "regard[ed] the report as advisory only" and entitled to "little weight." *Ibid.*

Over time, however, as administrative proceedings proliferated, agencies came increasingly to rely on their hearing examiners to engage in more substantive work. As a task force created by the Attorney General explained, in such a role the hearing examiner was "in a very real sense acting for the head of the agency. He is hearing cases because the heads cannot as a practical matter themselves sit. He plays an essential part in the process of hearing and deciding." *Attorney General's Report* 47. Congress thus recognized the need for a for-

malized legal framework to "increase the power and status of hearing officers." 2 Kenneth Culp Davis, *Administrative Law Treatise* § 10.01 (1958).

The APA codified the office and functions of the administrative hearing examiner—the position now called ALJ. Consistent with Congress's understanding that hearing officers would perform a critical role in formal agency adjudications, Section 7 of the APA required that certain administrative hearings be presided over only by "(1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act." 60 Stat. 241 (codified as amended at 5 U.S.C. 556(b)). Congress thus made clear the importance of hearing examiners by classifying them, along with the agency heads themselves, as the only individuals authorized to hold such hearings under the APA.

Congress also took steps to preserve the independence of the new hearing examiners, in response to the criticism that hearing examiners had previously been "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Ramspeck* v. *Federal Trial Exam'rs Conference*, 345 U.S. 128, 131 (1953). In Section 7(b) of the APA, Congress adopted the recommendation of the Attorney General's task force, which had advocated "fully empower[ing]" hearing examiners "by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them." *Attorney General's Report* 50; see APA § 7, 60 Stat. 241 (enumer-

ating presiding officer's "hearing powers") (capitalization altered). As the House Committee explained, Section 7(b) "assures that the presiding officer or officers will perform a real function rather than serve merely as notaries or policemen." S. Doc. No. 248, 79th Cong., 2d Sess. 269 (1946); see *ibid.* ("They would have and independently exercise all the powers listed in the section."); see also *Universal Camera Corp.*, 340 U.S. at 496 (Congress intended to "g[i]ve significance to the findings of examiners"). The provision was intended to ensure that the agency itself did not "in effect conduct hearings from behind the scenes where it cannot know the detailed happenings in the hearing room and does not hear or see the witnesses or private parties." S. Doc. No. 248, at 269; see *id.* at 207.

Section 8 provided, in turn, that when the agency itself has not presided over the hearing, the hearing examiner's initial decision, "in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, * * * shall without further proceedings then become the decision of the agency." APA § 8, 60 Stat. 242 (codified as amended at 5 U.S.C. 557(b)). This provision appears to reflect a recommendation by the Attorney General's task force that the relationship between a hearing examiner and the agency should be similar in many respects to "that of trial court to appellate court." *Attorney General's Report* 51; see S. Doc. No. 248, at 272 ("In a broad sense the agencies' reviewing powers are to be compared with that of courts."); see also *Universal Camera*, 340 U.S. at 495 (describing recommendation's influence on Congress). The hearing examiner's decision serves "as the initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court."

*Attorney General's Report* 51. Congress also recognized that a hearing examiner's initial or recommended decision would have special importance where credibility was at issue. Congress contemplated "that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses." *Attorney General's Manual on the Administrative Procedure Act* 84 (1947); see S. Doc. No. 248, at 272 (initial and recommended decisions "become a part of the record and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing").

The history of the APA thus makes clear that Congress intended for hearing examiners, the precursors to ALJs, to perform a significant and independent role in the adjudicative process, notwithstanding the fact that their decisions typically would be subject to further agency review. Although congressional intent is not dispositive of the constitutional question here, it reinforces the conclusion that the authority exercised by ALJs is—and was intended to be—significant.

b. This Court has recognized, in two related contexts, the similarity of the role played by ALJs in presiding over administrative hearings to the role performed by district judges in judicial proceedings. In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Court held that ALJs are entitled to absolute immunity from damages actions, rather than the qualified immunity normally available to Executive Branch officials. The Court reached that conclusion based on its view "that adjudication within a federal administrative agency shares * * * characteristics of the judicial process." *Id.*

at 512-513. "There can be little doubt," the Court explained, "that the role of the modern federal hearing examiner or administrative law judge within this framework is functionally comparable to that of a judge." *Id.* at 513 (internal quotation marks omitted). In presiding over proceedings that are "adversary in nature," an ALJ enjoys "powers [that] are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Ibid.* And, "importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Ibid.*; see *id.* at 514 ("When conducting a hearing * * * a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency.").

This Court also relied upon the parallel between agency adjudications and court proceedings in *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), in holding that a State could assert sovereign immunity in a proceeding of the Federal Maritime Commission (FMC), just as it could in a judicial proceeding. In so ruling, the Court found "the similarities between FMC proceedings and civil litigation [to be] overwhelming," explaining that "the role of the ALJ, the impartial officer designated to hear a case, is similar to that of an Article III judge." *Id.* at 758-579 (citation and footnote omitted). Among other things, the Court noted that an FMC ALJ had authority to arrange for a hearing at which the ALJ determined

the presentation of evidence, disposed of procedural motions, heard and ruled on substantive motions, administered oaths, examined witnesses, and ruled on the admission of evidence. *Ibid.* Those, of course, are the same functions performed by the Commission's ALJs. See 17 C.F.R. 201.111.

c. The functions exercised by the Commission's ALJs also have grown over time to more closely resemble those of trial judges. Early in its history, the Commission's authority to bring an administrative proceeding or to issue sanctions was relatively limited. As initially created, the Commission could only obtain a "stop order" suspending a securities registration statement and thus halting a public securities offering under Section 8 of the Securities Act of 1933. 48 Stat. 79-80 (codified as amended at 15 U.S.C. 77h). Congress later authorized the Commission to deny or revoke the registration of a broker-dealer under the Securities Exchange Act of 1934, §§ 14-18, 48 Stat. 895-898 (codified as amended at 15 U.S.C. 78*o*), or of an investment adviser under the Investment Advisers Act of 1940, § 203, 54 Stat. 850 (codified as amended at 15 U.S.C. 80b-3). Congress then amended the Exchange Act to authorize the Commission to suspend or bar persons "associated with" broker-dealers, and it expanded the grounds for denying or revoking broker-dealer registrations. Securities Acts Amendments of 1964, Pub. L. No. 88-467, 78 Stat. 570-574; see Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1431 (codified as amended at 15 U.S.C. 80b-3(f)) (adding similar authority to the Investment Advisers Act).

In 1990, Congress authorized the Commission—for the first time—to seek civil monetary penalties in enforcement proceedings against registered entities and

associated persons, Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 932 (codified at 15 U.S.C. 77t(d)), as well as to enter cease-and-desist orders against unregistered entities and persons, *id.* § 102, 104 Stat. 933-934. And in 2010, Congress further expanded the Commission's administrative enforcement authority, empowering the Commission to impose civil monetary penalties against unregistered entities. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1862. As the former Director of the Commission's Division of Enforcement explained, prior to Dodd-Frank, "penalties against unregulated entities or individuals were only available in district court. That legislative change allows us to obtain many —though not all—of the same remedies in administrative proceedings as we could get in district court." Andrew Ceresney, Director, SEC Division of Enforcement, U.S. SEC, *Remarks to the American Bar Association's Business Law Section Fall Meeting* (Nov. 21, 2014), https://www.sec.gov/news/speech/2014-spch112114ac.

Thus, the breadth and complexity of the proceedings that Congress has entrusted to the Commission have increased markedly since the Commission's inception. And as Congress has steadily increased the Commission's authority to proceed administratively against a wider array of individuals and businesses, and to impose more severe sanctions, the Commission has continued to rely on its ALJs to perform the bulk of the work associated with those proceedings, including compiling the record and issuing initial decisions regarding whether and what sanctions to impose. Today, the Commission's ALJs hear cases that a mere ten years ago could have appeared only in federal district courts.

### C. The Reasons Given Below For Treating The Commission's ALJs As Employees Are Unpersuasive

A panel of the court of appeals nonetheless concluded that the Commission's ALJs are not constitutional officers. In so finding, the panel gave dispositive weight to its perception that those ALJs have no authority to issue final decisions that "bind third parties, or the government itself, for the public benefit." Pet. App. 12a-13a; see *id.* at 13a ("Our analysis begins, and ends, there."). The panel's conclusion is based on a misunderstanding about the function of the Commission's ALJs and is, in any event, legally erroneous.

1. The panel below relied on its prior decision in *Landry* v. *FDIC*, 204 F.3d 1125 (D.C. Cir.), cert. denied, 531 U.S. 924 (2000), which read *Freytag* as treating final decision-making authority as the key to officer status. Pet. App. 11a-13a. The Commission's ALJs, the panel asserted, cannot issue final decisions: An ALJ's initial decision "becomes final when, and only when, the Commission issues [a] finality order, and not before then." *Id.* at 15a.

In placing conclusive weight on the purported lack of final decision-making authority by the Commission's ALJs, the panel misread *Freytag*. The Court in *Freytag* principally held that special trial judges were properly considered officers because they carried out "important functions" and "exercise[d] significant discretion." 501 U.S. at 882; see *id.* at 881-882. The Court reached that conclusion *despite* an argument that the special trial judges "lack[ed] authority to enter a final decision" in the entire category of proceedings at issue there (those not statutorily specified). *Id.* at 881. Giving dispositive weight to the absence of final decision-making authority, the Court explained, would improperly "ignore[ ] the

significance of the duties and discretion that special trial judges possess." *Ibid.*

To be sure, the Court went on to say that special trial judges would be officers "[e]ven if" their authority over such cases were "not as significant as [the Court] * * * ha[d] found them to be," given their authority to render final decisions in other types of cases (the statutorily specified proceedings). *Freytag*, 501 U.S. at 882. But "the Court clearly designated [that statement] as an alternative holding." *Landry*, 204 F.3d at 1142 (Randolph, J., concurring in part and concurring in the judgment). The Court in *Freytag* thus indicated that final authority to make certain discretionary decisions may be sufficient, but is not necessary, to render an official an "Officer[ ] of the United States" within the meaning of the Appointments Clause. In light of the substantial authority wielded by the Commission's ALJs, see pp. 21-25, *supra*, they are constitutional officers even without regard to the authority to issue final decisions of the agency.

The panel's analysis is dubious on its own terms, moreover, because the Commission's ALJs *are* statutorily authorized to issue final decisions of the agency in many cases. Congress has provided that if review by the Commission is not sought or is denied, the ALJ's initial decision "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. 78d-1(c). An ALJ's initial decision thus serves by statute as the final—and only—agency decision in a significant percentage of cases. *Bandimere*, 844 F.3d at 1187 n.41. The panel rejected the relevance of that provision, noting that the Commission has adopted a regulation preventing the decisions of its

ALJs from taking effect until the Commission has issued a finality order of its own. See Pet. App. 14a-18a. But as noted above, the ALJ's decision is still the Commission's final decision by operation of statute, even if the ALJ's decision does not take effect until the Commission issues a finality order confirming the Commission's choice not to grant plenary review. See pp. 23-24, *supra*.

2. The panel's focus on finality as a means of distinguishing officers from mere employees also is at odds with this Court's decision in *Edmond*, which involved an Appointments Clause challenge to the judges on the Coast Guard Court of Criminal Appeals. The petitioners, whose convictions had been upheld by the Court of Criminal Appeals, argued that the court's decisions were invalid because its judges were principal officers who had not been appointed by the President with the advice and consent of the Senate. 520 U.S. at 655-656. This Court disagreed, concluding instead that the judges were inferior officers. *Id.* at 658-666. In reaching that conclusion, the Court noted that the judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665. That fact was "significant," the Court explained, because it showed that the judges were supervised in the exercise of their authority by other Executive Branch officials, a clear sign that they were inferior, rather than principal, officers. *Ibid.*; see *id.* at 663. In *Edmond*, the Court thus held that the existence of final decision-making authority can be significant in drawing the dividing line between principal and inferior officers—not, as the panel below held, between constitutional officers and mere employees.

The panel below dismissed the relevance of *Edmond* on the ground that the government had conceded there that the judges were officers of some type, such that this Court "had no occasion to address the differences between employees and Officers." Pet. App. 13a. That reading of *Edmond* is unpersuasive. If the panel were correct that an official's lack of final decision-making authority automatically rendered that official an employee rather than an officer, the Appointments Clause challenge in *Edmond* would have been quite easy to resolve: Judges of the Court of Criminal Appeals did not have authority to render final decisions unless permitted to do so by other Executive Branch officers, and so (under the panel's reasoning) they could not be officers of any type, let alone principal officers. This Court nevertheless found them to be inferior officers only after considering a number of additional factors (tenure of office, jurisdiction, responsibilities, supervision by other officials, see 520 U.S. at 661-666), showing that the inability to render final decisions does not have the importance that the panel attributed to it.

3. In finding the Commission's ALJs to be mere employees, the panel below also mistakenly emphasized the relatively low level of deference afforded by the Commission to the decisions of its ALJs. The panel noted that the Commission "reviews an ALJ's decision *de novo* and 'may affirm, reverse, modify, or set aside' the initial decision, 'in whole or in part,' and it 'may make any findings or conclusions that in its judgment are proper and on the basis of the record.'" Pet. App. 18a-19a (quoting 17 C.F.R. 201.411(a)) (brackets omitted). The panel stressed that although the Commission has chosen to "defer to credibility determinations where the record provides no basis for disturbing the

finding," the Commission is "not required to adopt the credibility determinations of an ALJ." *Id.* at 19a. By contrast, the panel noted, "the Tax Court in *Freytag* was required to defer to the special trial judge's factual and credibility findings unless they were clearly erroneous." *Ibid.* (citation and internal quotation marks omitted).

The panel's proposed distinction of *Freytag* is unpersuasive. As the Commission noted in this very case, ALJ fact-finding usually will be given deference in practice because the ALJ "is in the best position to make findings of fact, including credibility determinations, and resolve any conflicts in the evidence." Pet. App. 241a. In any event, the level of deference afforded to the decisions of special trial judges in *Freytag* played no role in the Court's conclusion that they qualified as "Officers" within the meaning of the Appointments Clause. See 501 U.S. at 880-882. The Court mentioned deference in a different portion of its decision, addressing a distinct statutory-construction issue regarding the scope of the special trial judges' authority, and even there the Court stated that the "point [wa]s not relevant." *Id.* at 874 n.3.

There is similarly no merit to the panel's attempt to distinguish *Freytag* on the ground that the special trial judges at issue there were "members of an Article I court [who] could exercise the judicial power of the United States." Pet. App. 11a. *Freytag* did not mention the putative judicial status of special trial judges when considering whether they were officers. See 501 U.S. at 880-882. Only after the Court concluded that they were officers (in Part IV.B of its decision) did the Court go on to address whether the Tax Court was a "Court[] of law" within the meaning of the Appointments Clause (in

Part IV.C). See *id.* at 882 ("Having concluded that the special trial judges are 'inferior Officers,' we consider the substantive aspect of petitioners' Appointments Clause challenge."). Tellingly, although the Court was unanimous in holding that the special trial judges were constitutional officers, see *id.* at 901 (Scalia, J., concurring in part and concurring in the judgment) ("I agree with the Court that a special trial judge is an 'inferior Officer' within the meaning of this Clause.") (brackets omitted), the Court divided on the question whether special trial judges exercised judicial power, see *ibid.* ("I do not agree, however, with the Court's conclusion that the Tax Court is a 'Court of Law' within the meaning of this provision.") (brackets omitted). The former issue clearly did not turn on the latter.

### D. The Appointment Of The ALJ In This Case Did Not Comply With The Appointments Clause

The ALJ who presided in petitioners' case was an inferior officer, but the method of his appointment did not conform to the Appointments Clause. That ALJ was selected by the Commission's Chief ALJ, subject to approval by the Commission's Office of Human Resources. See p. 3, *supra*. Neither the President nor the Commission itself, as the constitutional Head of Department, played any role in the selection or approval of the ALJ. See Pet. App. 295a-297a. Petitioners raised the Appointments Clause issue before the Commission and the court of appeals. The decision below affirming a ruling by the Commission that rejected the need for the Commission to appoint its ALJ should accordingly be reversed.

## II. STATUTORY RESTRICTIONS ON REMOVAL OF THE COMMISSION'S ALJs MUST BE NARROWLY CONSTRUED IN LIGHT OF SERIOUS SEPARATION-OF-POWERS CONCERNS

The conclusion that the Commission's ALJs wield significant governmental authority, of the type that can only be exercised by constitutional officers, has implications for whether the statutory constraints on removing ALJs from office unconstitutionally impair the President's ability to faithfully execute the laws. See *Free Enter. Fund*, 561 U.S. at 504. Because the restraints on removing ALJs are statutory, a decision by this Court addressing only the requirements for appointing ALJs—but not the restrictions on removing them—would leave significant uncertainty surrounding the constitutionality of administrative proceedings conducted by the Commission and by other agencies throughout the government that use ALJs in adversarial proceedings. The public interest therefore strongly favors addressing the removal restraints in this case. To avoid serious constitutional concerns, the Court should construe the statutory provision that addresses tenure protections for ALJs, 5 U.S.C. 7521(a), to permit the removal of an ALJ for misconduct or failure to follow lawful agency directives or to perform his duties adequately. It should also clarify that the MSPB's review is limited to determining whether factual evidence exists to support the agency's proffered good faith grounds.[7]

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[7] The removal issue is fairly encompassed within the question presented whether the Commission's ALJs "are Officers of the United States within the meaning of the Appointments Clause." Pet. i. Just

### A. The President's Constitutional Responsibility To Faithfully Execute The Laws Requires Adequate Authority To Remove Subordinate Officers

1. By vesting in the President "[t]he executive Power" of the United States, U.S. Const. Art. II, § 1, Cl. 1, and charging him with the duty to "take Care that the Laws be faithfully executed," *id.* § 3, Article II of the Constitution "confers on the President 'the general administrative control of those executing the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting *Myers* v. *United States*, 272 U.S. 52, 164 (1926)). The Framers understood the close connection between the President's ability to discharge his responsibilities as head of the Executive Branch and his control over its personnel. As James Madison explained, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834); see *Free Enter. Fund*, 561 U.S. at 501 (describing those powers as "perhaps *the* key means" through which the President may resist encroachment on executive power). The President's "ability to execute the laws" is thus inextricably linked to his authority to

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as a determination that ALJs are constitutional "Officers" has consequences under the Constitution for the manner of their appointment, so too does it implicate the procedures under which they may permissibly be removed from that office. See U.S. Cert. Br. 19-21. Should the Court agree that the Commission's ALJs are officers, therefore, the scope of the appropriate remedy in this case will depend on whether the Court concludes that the ALJ who presided over petitioners' hearing was subject to appointment and removal in conformance with constitutional constraints. See Cert. Reply Br. 11 (acknowledging that petitioners "would raise the removal issue," if not resolved here, as a defense in a further proceeding on remand before the Commission).

"hold[] his subordinates accountable for their conduct." *Free Enter. Fund*, 561 U.S. at 496.

The Constitution gives the President what the Framers saw as the "traditional" means of ensuring accountability: the "power to oversee executive officers through removal." *Free Enter. Fund*, 561 U.S. at 492. The power to remove, being "incident to the power of appointment," rests with the appointing authority absent an express statement to the contrary. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 261 (1839). "[B]ecause that traditional executive power was not 'expressly taken away'" by the Constitution, "'it remained with the President'" in the first instance. *Free Enter. Fund*, 561 U.S. at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 *Documentary History of the First Federal Congress* 893 (2004)). The President is accordingly authorized under our constitutional system to remove all principal officers, as well as all "inferior Officers" he has appointed. U.S. Const. Art. II, § 2, Cl. 2. Other "inferior Officers," whose appointments have been vested in "the Heads of Departments," may be removed by those Department Heads—who are themselves removable by the President. *Ibid.* As this Court has explained, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (citation omitted).

Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Myers*, 272 U.S. at 117. Absent adequate authority to remove his subordinates, the President could plausibly "escape responsibility for

his choices by pretending that they are not his own." *Free Enter. Fund*, 561 U.S. at 497. And if the Executive Branch itself were to "slip from the Executive's control," executive authority would similarly become unaccountable to the will of "the people." *Id.* at 499. The removal power thus is a key safeguard of democratic self-governance, preserving an unbroken chain of responsibility from the American people to the public officials who serve them. See 1 Annals of Cong. at 499 (Madison) ("[T]he lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.").

2. Consistent with these principles, this Court has countenanced only limited restrictions on the authority of the President to remove executive officers. As to principal officers, the Court has sustained such restrictions only with respect to members of certain multi-member independent agencies. See *Free Enter. Fund*, 561 U.S. at 493-494. As to inferior officers, this Court has twice upheld restrictions on removal authority. But neither decision provides justification for undercutting the fundamental constitutional requirement that the Executive have adequate means to supervise and instruct officers in the performance of their duties.

In *United States* v. *Perkins*, 116 U.S. 483 (1886), the Court held that the Secretary of the Navy could be required by statute, before removing a naval cadet-engineer during peacetime, to make a misconduct finding or convene a court-martial. *Id.* at 485. It was undisputed in *Perkins* that the cadet was discharged, not for any reason related to performance, but solely due to the want of a vacancy for him. *Id.* at 483. The Court thus had no cause to consider what sort of misconduct or performance-related justification would be adequate

to support removal under the terms of the statute. Cf. *Free Enter. Fund*, 561 U.S. at 507 ("Military officers are broadly subject to Presidential control through the chain of command and through the President's powers as Commander in Chief."). Thus, although *Perkins* addressed a statute that imposed some restrictions on the removal of certain military officers, it did not suggest that such officers could be placed beyond adequate Executive Branch supervision.

In *Morrison* v. *Olson*, 487 U.S. 654 (1988), the Court upheld a statute that allowed the Attorney General to remove an independent counsel only for "good cause." *Id.* at 685-693. The Court declined to decide "exactly what is encompassed within the term 'good cause,'" but stressed its understanding that "the Attorney General may remove an independent counsel for 'misconduct.'" *Id.* at 692 (quoting H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 37 (1987)). Through that removal authority, the Court asserted, the President "retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities." *Ibid.* The Court also emphasized that its conclusion rested in part on the independent counsel's "limited jurisdiction and tenure and lack[ of] policymaking or significant administrative authority." *Id.* at 691. Although the independent counsel did exercise "discretion and judgment" in carrying out his responsibilities, the Court concluded that "the President's need to control the exercise of that discretion [was not] so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 691-692.

3. The Court reached a different result in *Free Enterprise Fund*, where it struck down a statutory provision that imposed stringent limitations on the removal of inferior officers within an agency whose principal officers were themselves assumed to be subject to strict removal restrictions. Created by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, the Public Company Accounting Oversight Board (PCAOB) was composed of five members appointed by the Commission. 561 U.S. at 484. The PCAOB's members enjoyed "rigorous" statutory removal protections: A member could be removed only upon a finding by the Commission—on the record and after a hearing—that the member "has willfully violated" the Sarbanes-Oxley Act, the securities laws, or the PCAOB's rules; "has willfully abused" his authority; or, "without reasonable justification or excuse," has failed to enforce compliance with the statutes, rules, or PCAOB standards. *Id.* at 486, 496 (quoting 15 U.S.C. 7217(d)(3)). And although no statute so provides, the parties in *Free Enterprise Fund* agreed (and this Court assumed) that the Commissioners themselves could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487 (citation omitted).

This Court concluded, in light of the "novel" and "rigorous" barriers to removal that this two-tiered scheme created, that it left the President with insufficient ability to supervise the PCAOB's execution of the laws. *Free Enter. Fund*, 561 U.S. at 496. Each layer of tenure protection, the Court explained, significantly weakened executive control. The PCAOB's members were protected from removal by an "unusually high standard" that sharply constrained both the legal grounds for removal and the procedures under which it could occur;

even a member who committed a crime not specifically mentioned by the Sarbanes-Oxley Act (such as tax evasion) would be entitled to keep his position. *Id.* at 503. And the Commission's members, it was assumed, were themselves protected from removal absent conduct "so unreasonable as to constitute 'inefficiency, neglect of duty, or malfeasance in office.'" *Id.* at 496 (citation omitted). In combination, the Court explained, these "unusual protections from Presidential oversight" impermissibly undermined executive authority and political accountability. *Id.* at 506. Particularly in light of the PCAOB's important role as "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy," the Court determined that the PCAOB's tenure protections were unconstitutional, and it invalidated and severed them from the rest of the statute. *Id.* at 508.

**B. To Avoid Serious Constitutional Concerns, This Court Should Narrowly Construe "Good Cause" Restrictions On Removing ALJs**

The APA provides that an ALJ may be removed by an agency head "only for good cause established and determined by the Merit Systems Protection Board," 5 U.S.C. 7521(a), whose members are themselves removable by the President "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. 1202(d). Section 7521 is best interpreted to permit an agency to remove an ALJ for personal misconduct or for failure to follow lawful agency directives or to perform his duties adequately. The Court should construe the provision in that manner to safeguard the President's power to control and supervise the Executive Branch, while at the same time respecting the independence of ALJs in adjudicating individual cases. Although the Commission

(and some other agencies) have taken steps, following the government's filing of its response to the certiorari petition in this case, to ensure that future proceedings are overseen by properly appointed ALJs, see p. 3 n.2, *supra*, those proceedings will satisfy Article II only if the ALJs' removal protections also comply with constitutional constraints.

1. Congress did not define the term "good cause" or otherwise elaborate the permissible grounds on which an ALJ may be removed under Section 7521. The MSPB, in implementing Section 7521, has applied that term to a range of performance- and conduct-related justifications. The MSPB has recognized, *inter alia*, that removal may be appropriate where an ALJ "ignore[s] binding agency interpretations of law," *Social Sec. Admin.* v. *Anyel*, 58 M.S.P.R. 261, 269 (1993); that a "large proportion" of "significant" adjudicatory errors can constitute "good cause," *id.* at 265; and that, in unusual cases, an ALJ may be removed "on the basis of actions taken by him or her in the course of an adjudicatory proceeding," *In re Chocallo*, 1 M.S.P.R. 605, 610 (1980); see *ibid.* (permitting removal of ALJ for refusing to comply with an appellate agency order, declining to turn over records to agency officials when directed, and intemperate questioning of witnesses). The Constitution requires that an ALJ be removable on such grounds to enable the President and the agency head to ensure the soundness and integrity of the adjudicatory system for which they are responsible, and thus to ensure the faithful execution of the laws.

In other instances, however, the MSPB has declined to sustain the removal of ALJs even when misconduct has been substantiated by the agency seeking removal. The MSPB not only has "reserve[d] to itself the final

decision on [whether] good cause" for discipline exists, but also has asserted the right to determine "the appropriate penalty if it finds good cause." *Social Sec. Admin.* v. *Glover*, 23 M.S.P.R. 57, 64 (1984); see 5 C.F.R. 1201.140(b) (MSPB "will specify the penalty to be imposed"); see also, *e.g.*, *Social Sec. Admin.* v. *Brennan*, 27 M.S.P.R. 242, 248, 251 (1985), aff'd 787 F.2d 1559 (Fed. Cir.), cert. denied, 479 U.S. 985 (1986) (ALJ's pattern of "disruptive conduct," including refusal to follow office procedures, supported only a 60-day suspension rather than removal); *Glover*, 23 M.S.P.R. at 80 (ALJ's "intemperate" remarks to supervisor supported 120-day suspension without pay but not removal). The MSPB has similarly rejected, under certain circumstances, agency attempts to remove ALJs for deficient performance. Compare *Social Sec. Admin.* v. *Goodman*, 19 M.S.P.R. 321, 331 (1984) (ALJ could not be disciplined for productivity far below national averages in absence of specific evidence that ALJ's docket was comparable to those of peers), with *Shapiro* v. *Social Sec. Admin.*, 800 F.3d 1332, 1338 (Fed. Cir. 2015) (declining to follow *Goodman* and describing that decision as establishing "a virtually insurmountable burden of proof") (citation omitted).

Agency heads must be able to remove ALJs who refuse to follow agency policies and procedures, who frustrate the proper administration of adjudicatory proceedings, or who demonstrate deficient job performance. Otherwise, the agency head would be effectively in the same position as the Commission in *Free Enterprise Fund*: The agency head would "not [be] responsible for the [ALJ's] actions," and would instead be responsible only for deciding whether to initiate a removal action in light of the MSPB's standards. 561 U.S. at 496.

Without the authority to remove an ALJ for misconduct or for failure to follow lawful instructions or perform adequately, the President (and his chosen principal officers) cannot properly supervise those who exercise executive authority. "This violates the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." *Id.* at 496-497 (citation and internal quotation marks omitted).

These constitutional concerns are heightened in the context of independent agencies whose heads are themselves protected from removal by the President. If Section 7521 were construed not to allow the sort of removal authority described above, the additional level of tenure protection would only further undermine the President's ability to supervise the actions of the Executive Branch. See *Free Enter. Fund*, 561 U.S. at 496 ("Neither the President, nor anyone directly responsible to him, * * * has full control."). As a result, the President would be "stripped of the power [this Court's] precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—[would be] impaired." *Ibid.*

2. To avoid these serious constitutional concerns, the Court should construe Section 7521 to permit agency heads to remove ALJs, subject to limited review by the MSPB, in a manner that is consistent with a constitutionally adequate level of Executive Branch supervision.

a. Section 7521(a) provides for the removal of ALJs for "good cause," which is most naturally read to authorize removal of an ALJ for misconduct, poor job performance, or failure to follow lawful directives. The

term "good cause," which is not otherwise defined by statute, was understood at the time of the APA's enactment to refer to a "[s]ubstantial" or "[l]egally sufficient ground or reason." *Black's Law Dictionary* 822 (4th ed. 1951). When specifically used to refer to employer actions such as the "discharg[e]" of personnel, the term's conventional meaning "include[d] any ground which is put forward by authorities in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the duties with which such authorities are charged." *Ibid.* (describing holding of *Nephew* v. *Willis*, 298 N.W. 376 (Mich. 1941)).

In adopting "good cause" to describe the standard for removing ALJs, Congress did not purport to deviate from that term's well-understood meaning. To the contrary, as the APA's co-sponsor explained, although "[t]he cause found must be real and demonstrable," and must be based on "facts and considerations warranting the finding," Congress had no intention to confine agencies to a limited category of acceptable reasons. S. Doc. No. 248, at 326 (Sen. McCarran). And although this Court has not previously attempted to provide a comprehensive definition of "good cause," it has rejected attempts to link that APA standard with another, more stringent standard drawn from a different context. See *Ramspeck*, 345 U.S. at 142 (rejecting argument that "good cause" for removing hearing examiners is the same as the showing required to remove Article III judges). The Court in *Ramspeck* explained that Congress did not intend for hearing examiners to be removed "at the whim or caprice of the agency or for political reasons," but that an agency is nevertheless authorized to discharge its hearing examiners for other, "legitimate reasons." *Id.* at 142-143.

The term "good cause" is thus best read to include an ALJ's failure to perform adequately or to follow agency policies, procedures, or instructions. See *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting) (explaining that constitutionally permissible authority to remove an inferior officer "*for cause* * * * would include, of course, the failure to accept supervision"). This construction provides agencies with constitutionally sufficient latitude to remove an ALJ for appropriate job-related reasons; it ensures the agency head's control—and, by extension, the President's—over the important executive functions performed by these inferior officers. This construction, in addition to being the best reading of the text, is therefore supported by well-established principles of constitutional avoidance. See *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 466 (1989).

Under the foregoing construction of the "for cause" standard, an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law. See, *e.g.*, 42 U.S.C. 2000e-16(a) ("All personnel actions affecting employees * * * in executive agencies * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin."). And the President, acting through his principal officers, would be restrained from removing an ALJ in order to influence the outcome in a particular adjudication. As this Court explained in *Myers*, "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." 272 U.S. at 135. But *Myers* also made clear that "even in such a case," the

President "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed." *Ibid.*

Although applying this construction of "good cause" to ALJs at independent agencies still results in a structure involving more than one layer of tenure protection, it comports with constitutional requirements. The intrusion on presidential authority is significantly less than under the provision invalidated in *Free Enterprise Fund*, in which the PCAOB's members could be removed only under an "unusually high standard" that required a "willful" violation of the law, a "willful" abuse of their authority, or an "unreasonable" failure to enforce legal requirements. 561 U.S. at 503. Under the natural interpretation of "good cause" and the standard advocated here, by contrast, an ALJ is removable for failure to accept lawful supervision or perform his duties adequately. ALJs could accordingly be held accountable, by the Heads of Departments and the President who appointed them, for failure to execute the laws faithfully. And even an independent agency head with sufficiently broad authority to remove an ALJ may be held accountable by the President for failing to exercise that authority appropriately. Construing "good cause" as the best reading of that term requires and we urge, therefore, effectively mitigates concerns with multiple

levels of removal protection, ensuring sufficient presidential control over the Executive Branch.[8]

b. In addition to adopting the construction of "good cause" described above, the Court should construe the statutory requirement that such cause be "established and determined by the Merit Systems Protection Board," 5 U.S.C. 7521(a), to ensure adequate supervision and accountability by the head of the agency whose laws, policies, and procedures the ALJ must follow. Doing so requires proper regard for the judgment of the head of the agency concerning what is required from subordinates in order to properly exercise the authority vested by law in the agency.

To accomplish that end, Section 7521 can reasonably be interpreted to mean that the cause relied upon by the agency for removing its ALJ has been *found by* the MSPB—that is, the MSPB has determined that factual evidence exists to support the agency's proffered, good-faith grounds. That construction differs from the MSPB's current practice of determining not simply whether facts exist to support the agency's determination, but whether in the MSPB's view those facts amount to "good cause" and also warrant removal or other sanctions sought by the agency. See *Glover*, 23 M.S.P.R. at 64. Reading the phrase "established and determined by the [MSPB]" in the manner proposed

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[8] *Free Enterprise Fund* was decided on the understanding that the Commission's members could not be removed from office by the President except for "inefficiency, neglect of duty, or malfeasance in office." 561 U.S. at 487 (citation omitted). We take no position here on whether such protections validly exist as a statutory or constitutional matter. It is also unnecessary for the Court to address those questions. The interpretation of "good cause" that is proposed here conforms to constitutional constraints even when the Department Head is permissibly insulated from presidential removal at will.

here is well within the range of constructions available to the Court under the canon of constitutional avoidance. See *Ramspeck*, 345 U.S. at 142 (APA "leaves with the agency the responsibility" to determine whether unneeded hearing examiners should be discharged, subject to appeal to Civil Service Commission to "prevent any devious practice by an agency which would abuse" that power). And thus interpreted, Section 7521 leaves agency heads with constitutionally adequate authority to ensure that ALJs are faithfully executing the law.

c. If the Court concludes that the interpretation of Section 7521 advocated here cannot be reconciled with the statute, then the limitations that the provision imposes on removal of the Commission's ALJs would be unconstitutional. To resolve those concerns, the Court should invalidate and sever only the portion or portions of Section 7521 that cannot be interpreted, under principles of constitutional avoidance, to accord agency heads appropriate supervision of ALJs as inferior officers within their agencies. Absent those unconstitutional requirements, the remaining statute would be "fully operative as a law," and "nothing in the statute's text or historical context makes it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred" invalidation of the APA *in toto*. *Free Enter. Fund*, 561 U.S. at 509 (citation and internal quotation marks omitted).

3. In addition to articulating a standard under which ALJs may be removed from office, Section 7521 addresses the sequence of events that must occur before removal. It provides that "[a]n action may be taken against an [ALJ]" by the agency "only for good cause established and determined by the [MSPB] on the record *after opportunity for hearing before the Board*."

5 U.S.C. 7521(a) (emphasis added); see 5 U.S.C. 7521(b) (identifying "removal" as an "action" covered by subsection (a)). Removal thus may occur only "after" an MSPB hearing regarding good cause. As a result, an ALJ may remain in office—despite the employing agency's determination that the ALJ's misconduct or poor performance warrants removal—until the MSPB has ruled on the dispute. That required sequence for ALJs differs from the rules that apply to most federal employees, who may be removed from the civil service promptly, subject to minimal procedural requirements (including at least 30 days' notice and 7 days to respond). See 5 U.S.C. 7513(b); see also 5 U.S.C. 7701(b)(2) (employee's removal remains in effect until agency's removal decision is overturned by MSPB).

The procedures under Section 7521 for removing ALJs may, in some circumstances, undermine the ability of Department Heads to properly supervise their subordinates in the manner the Constitution requires. An agency's decision to remove an ALJ may be a determination that the ALJ cannot be trusted to faithfully execute the laws. Yet the ALJ's removal from office cannot be effectuated until the MSPB rules, which may take a substantial period of time—in some cases, years. See, *e.g.*, *Social Sec. Admin.* v. *Boini*, 123 M.S.P.R. 302 (2016) (Tbl.) (MSPB ruling 44 months after agency sought to remove ALJ); *Social Sec. Admin.* v. *Long*, 113 M.S.P.R. 190 (2010), aff'd, 635 F.3d 526 (Fed. Cir. 2011) (19 months). In the interim, the ALJ will continue to occupy the office for which the agency has deemed him unfit, and he will continue to draw a salary from the agency.

This case, however, does not implicate those constitutional concerns. Agencies currently possess the authority to reassign responsibilities away from ALJs while awaiting MSPB review of a removal decision. See *Mahoney* v. *Donovan*, 721 F.3d 633, 637 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 2724 (2014). That authority avoids the possibility that an ALJ might continue to adjudicate cases beyond the point at which the Department Head has lost confidence in the ALJ's ability to exercise appropriate judgment. Other concerns with an ALJ's compensation or continued employment within the agency (albeit without his duties) do not bear on a private litigant's constitutional right to an adjudication before a properly appointed decision-maker. See *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (declining, in context of federalism-based constitutional claim, to address validity of provisions implicating "rights and obligations of parties not before the Court"). Such concerns bear only on the Executive Branch's ability to adequately supervise ALJs, and thus should be addressed in appropriate cases between employing agencies and their ALJs.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. Article II, Section 2, Clause 2 of the United States Constitution provides in relevant part:

> * * * [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. 5 U.S.C. 556 provides:

> **Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.
>
> (b) There shall preside at the taking of evidence—
>
> (1) the agency;
>
> (2) one or more members of the body which comprises the agency; or
>
> (3) one or more administrative law judges appointed under section 3105 of this title.
>
> This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for

by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding,

constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

3. 5 U.S.C. 557 provides:

**Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this

title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

4. 5 U.S.C. 3105 provides:

**Appointment of administrative law judges**

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

5. 5 U.S.C. 7521 provides:

**Actions against administrative law judges**

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include—

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1215 of this title.

6. 15 U.S.C. 78d-1 provides:

**Delegation of functions by Commission**

**(a) Authorization; functions delegable; eligible persons; application of other laws**

In addition to its existing authority, the Securities and Exchange Commission shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. Nothing in this section shall be deemed to supersede the provisions of section 556(b) of title 5, or to authorize the delegation of the function of rulemaking as defined in subchapter II of chapter 5 of title 5, with reference to general rules as distinguished from rules of particular applicability, or of the making of any rule pursuant to section 78s(c) of this title.

**(b) Right of review; procedure**

With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, upon its own initiative or upon petition of a party to or intervenor in such action, within such time and in such manner as the Commission by rule shall prescribe. The vote of one member of the Commission shall be sufficient to bring any such action before the Commission for review. A person or party shall be entitled to review by the Commission if he or it is adversely

affected by action at a delegated level which (1) denies any request for action pursuant to section 77h(a) or section 77h(c) of this title or the first sentence of section 781(d) of this title; (2) suspends trading in a security pursuant to section 781(k) of this title; or (3) is pursuant to any provision of this chapter in a case of adjudication, as defined in section 551 of title 5, not required by this chapter to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in section 554(a)(1) through (6) of such title 5).

**(c) Finality of delegated action**

If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.

7. 17 C.F.R. 201.110 provides:

**Presiding officer.**

All proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer. When the Commission designates that the hearing officer shall be an administrative law judge, the Chief Administrative Law Judge shall select, pursuant to 17 CFR 200.30-10, the administrative law judge to preside.

8. 17 C.F.R. 201.111 provides:

**Hearing officer: Authority.**

The hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act, 5 U.S.C. 556, 557. The powers of the hearing officer include, but are not limited to, the following:

(a) Administering oaths and affirmations;

(b) Issuing subpoenas authorized by law and revoking, quashing, or modifying any such subpoena;

(c) Receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(d) Regulating the course of a proceeding and the conduct of the parties and their counsel;

(e) Holding prehearing and other conferences as set forth in § 201.221 and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(f) Recusing himself or herself upon motion made by a party or upon his or her own motion;

(g) Ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(h) Subject to any limitations set forth elsewhere in these Rules of Practice, considering and ruling upon all

procedural and other motions, including a motion to correct a manifest error of fact in the initial decision. A motion to correct is properly filed under this Rule only if the basis for the motion is a patent misstatement of fact in the initial decision. Any motion to correct must be filed within ten days of the initial decision. A brief in opposition may be filed within five days of a motion to correct. The hearing officer shall have 20 days from the date of filing of any brief in opposition filed to rule on a motion to correct;

(i) Preparing an initial decision as provided in § 201.360;

(j) Upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission; and

(k) Informing the parties as to the availability of one or more alternative means of dispute resolution, and encouraging the use of such methods.

9. 17 C.F.R. 201.180 provides:

**Sanctions.**

(a) *Contemptuous conduct*—(1) *Subject to exclusion or suspension.* Contemptuous conduct by any person before the Commission or a hearing officer during any proceeding, including at or in connection with any conference, deposition or hearing, shall be grounds for the Commission or the hearing officer to:

(i) Exclude that person from such deposition, hearing or conference, or any portion thereof; and/or

(ii) Summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

(2) *Review procedure.* A person excluded from a deposition, hearing or conference, or a counsel summarily suspended from practice for the duration or any portion of a proceeding, may seek review of the exclusion or suspension by filing with the Commission, within three days of the exclusion or suspension order, a motion to vacate the order. The Commission shall consider such motion on an expedited basis as provided in § 201.500.

(3) *Adjournment.* Upon motion by a party represented by counsel subject to an order of exclusion or suspension, an adjournment shall be granted to allow the retention of new counsel. In determining the length of an adjournment, the Commission or hearing officer shall consider, in addition to the factors set forth in § 201.161, the availability of co-counsel for the party or of other members of a suspended counsel's firm.

(b) *Deficient filings; leave to cure deficiencies.* The Commission or the hearing officer may reject, in whole or in part, any filing that fails to comply with any requirements of these Rules of Practice or of any order issued in the proceeding in which the filing was made. Any such filings shall not be part of the record. The Commission or the hearing officer may direct a party to cure any deficiencies and to resubmit the filing within a fixed time period.

(c) *Failure to make required filing or to cure deficient filing.* The Commission or the hearing officer may enter a default pursuant to § 201.155, dismiss one or

more claims, decide the particular claim(s) at issue against that person, or prohibit the introduction of evidence or exclude testimony concerning that claim if a person fails:

(1) To make a filing required under these Rules of Practice; or

(2) To cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to paragraph (b) of this section.

10. 17 C.F.R. 201.360 provides:

**Initial decision of hearing officer and timing of hearing.**

(a)(1) *When required.* Unless the Commission directs otherwise, the hearing officer shall prepare an initial decision in any proceeding in which the Commission directs a hearing officer to preside at a hearing, provided, however, that an initial decision may be waived by the parties with the consent of the hearing officer pursuant to § 201.202.

(2) *Time period for filing initial decision and for hearing*—(i) *Initial decision.* In the order instituting proceedings, the Commission will specify a time period in which the hearing officer's initial decision must be filed with the Secretary. In the Commission's discretion, after consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors, this time period will be either 30, 75, or 120 days. The time period will run from the occurrence of the following events:

(A) The completion of post-hearing briefing in a proceeding where the hearing has been completed; or

(B) The completion of briefing on a § 201.250 motion in the event the hearing officer has determined that no hearing is necessary; or

(C) The determination by the hearing officer that, pursuant to § 201.155, a party is deemed to be in default and no hearing is necessary.

(ii) *Hearing.* Under the 120-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately four months (but no more than ten months) from the date of service of the order instituting the proceeding. Under the 75-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately 2½ months (but no more than six months) from the date of service of the order instituting the proceeding. Under the 30-day timeline, the hearing officer shall issue an order scheduling the hearing to begin approximately one month (but no more than four months) from the date of service of the order instituting the proceeding. These deadlines confer no substantive rights on respondents. If a stay is granted pursuant to § 201.161(c)(2)(i) or § 201.210(c)(3), the time period specified in the order instituting proceedings in which the hearing officer's initial decision must be filed with the Secretary, as well as any other time limits established in orders issued by the hearing officer in the proceeding, shall be automatically tolled during the period while the stay is in effect.

(3) *Certification of extension; motion for extension.* (i) In the event that the hearing officer presiding over the proceeding determines that it will not be possible to

file the initial decision within the specified period of time, the hearing officer may certify to the Commission in writing the need to extend the initial decision deadline by up to 30 days for case management purposes. The certification must be issued no later than 30 days prior to the expiration of the time specified for the issuance of an initial decision and be served on the Commission and all parties in the proceeding. If the Commission has not issued an order to the contrary within 14 days after receiving the certification, the extension set forth in the hearing officer's certification shall take effect.

(ii) Either in addition to a certification of extension, or instead of a certification of extension, the Chief Administrative Law Judge may submit a motion to the Commission requesting an extension of the time period for filing the initial decision. First, the hearing officer presiding over the proceeding must consult with the Chief Administrative Law Judge. Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension of the time period for filing the initial decision. This motion may request an extension of any length but must be filed no later than 15 days prior to the expiration of the time specified in the certification of extension, or if there is no certification of extension, 30 days prior to the expiration of the time specified in the order instituting proceedings. The motion will be served upon all parties in the proceeding, who may file with the Commission statements in support of or in opposition to the motion. If the Commission determines that additional time is necessary or appropriate in the public interest, the Commission shall issue an order extending the time period for filing the initial decision.

(iii) The provisions of this paragraph (a)(3) confer no rights on respondents.

(b) *Content.* An initial decision shall include findings and conclusions, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof. The initial decision shall also state the time period, not to exceed 21 days after service of the decision, except for good cause shown, within which a petition for review of the initial decision may be filed. The reasons for any extension of time shall be stated in the initial decision. The initial decision shall also include a statement that, as provided in paragraph (d) of this section:

(1) The Commission will enter an order of finality as to each party unless a party or an aggrieved person entitled to review timely files a petition for review of the initial decision or a motion to correct a manifest error of fact in the initial decision with the hearing officer, or the Commission determines on its own initiative to review the initial decision; and

(2) If a party or an aggrieved person entitled to review timely files a petition for review or a motion to correct a manifest error of fact in the initial decision with the hearing officer, or if the Commission takes action to review as to a party or an aggrieved person entitled to review, the initial decision shall not become final as to that party or person.

(c) *Filing, service and publication.* The Secretary shall promptly serve the initial decision upon the parties and shall promptly publish notice of the filing thereof on

the SEC Web site. Thereafter, the Secretary shall publish the initial decision in the SEC Docket; provided, however, that in nonpublic proceedings no notice shall be published unless the Commission otherwise directs.

(d) *Finality.* (1) If a party or an aggrieved person entitled to review timely files a petition for review or a motion to correct a manifest error of fact in the initial decision, or if the Commission on its own initiative orders review of a decision with respect to a party or a person aggrieved who would be entitled to review, the initial decision shall not become final as to that party or person.

(2) If a party or aggrieved person entitled to review fails to file timely a petition for review or a motion to correct a manifest error of fact in the initial decision, and if the Commission does not order review of a decision on its own initiative, the Commission will issue an order that the decision has become final as to that party. The decision becomes final upon issuance of the order. The order of finality shall state the date on which sanctions, if any, take effect. Notice of the order shall be published in the *SEC Docket* and on the SEC Web site.

11. 17 C.F.R. 201.411 provides:

**Commission consideration of initial decisions by hearing officers.**

(a) *Scope of review.* The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.

(b) *Standards for granting review pursuant to a petition for review*—(1) *Mandatory review.* After a petition for review has been filed, the Commission shall review any initial decision that:

(i) Denies any request for action pursuant to Section 8(a) or Section 8(c) of the Securities Act of 1933, 15 U.S.C. 77h(a), (c), or the first sentence of Section 12(d) of the Exchange Act, 15 U.S.C. 781(d);

(ii) Suspends trading in a security pursuant to Section 12(k) of the Exchange Act, 15 U.S.C. 781(k); or

(iii) Is in a case of adjudication (as defined in 5 U.S.C. 551) not required to be determined on the record after notice and opportunity for hearing (except to the extent there is involved a matter described in 5 U.S.C. 554(a)(1) through (6)).

(2) *Discretionary review.* The Commission may decline to review any other decision. In determining whether to grant review, the Commission shall consider whether the petition for review makes a reasonable showing that:

(i) A prejudicial error was committed in the conduct of the proceeding; or

(ii) The decision embodies:

(A) A finding or conclusion of material fact that is clearly erroneous; or

(B) A conclusion of law that is erroneous; or

(C) An exercise of discretion or decision of law or policy that is important and that the Commission should review.

(c) *Commission review other than pursuant to a petition for review.* The Commission may, on its own initiative, order review of any initial decision, or any portion of any initial decision, within 21 days after the end of the period established for filing a petition for review pursuant to § 201.410(b). A party who does not intend to file a petition for review, and who desires the Commission's determination whether to order review on its own initiative to be made in a shorter time, may make a motion for an expedited decision, accompanied by a written statement that the party waives its right to file a petition for review. The vote of one member of the Commission, conveyed to the Secretary, shall be sufficient to bring a matter before the Commission for review.

(d) *Limitations on matters reviewed.* Review by the Commission of an initial decision shall be limited to the issues specified in an opening brief that complies with § 201.450(b), or the issues, if any, specified in the briefing schedule order issued pursuant to § 201.450(a). Any exception to an initial decision not supported in an opening brief that complies with § 201.450(b) may, at the discretion of the Commission, be deemed to have been waived by the petitioner. On notice to all parties, however, the Commission may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) *Summary affirmance.* (1) At any time within 21 days after the filing of a petition for review pursuant to § 201.410(b), any party may file a motion in accordance with § 201.154 asking that the Commission summarily affirm an initial decision. Any party may file an opposition and reply to such motion in accordance with

§ 201.154. Pending determination of the motion for summary affirmance, the Commission, in its discretion, may delay issuance of a briefing schedule order pursuant to § 201.450.

(2) Upon consideration of the motion and any opposition or upon its own initiative, the Commission may summarily affirm an initial decision. The Commission may grant summary affirmance if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument. The Commission will decline to grant summary affirmance upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.

(f) *Failure to obtain a majority.* In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.